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COURT OF CRIMINAL APPEALS
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NO. PD-1292-19

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/4/2020
DEANA WILLIAMSON, CLERK

FREDERICK L. BROWN,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 47,806-A
In the 188th Judicial District Court of
Gregg County, Texas and
Cause Number 06-19-00082-CR
In the Court of Appeals for the Sixth
Judicial District of Texas

BRIEF FOR THE STATE OF TEXAS

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ORAL ARGUMENT REQUESTED

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FREDERICK L. BROWN……..…..…….……..……..Appellant

v.

THE STATE OF TEXAS,…..…..……...Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, THE STATE OF TEXAS**,** by and through her Criminal District Attorney, Tom B. Watson, and as Appellee in the above numbered and entitled cause, and files this the Appellee's brief showing:

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully requests that this Honorable Court allow the State the opportunity to argue this case before the Court of Criminal Appeals. This case involves a wide range of interconnected fact specific issues, and oral argument will enable the parties to fully explain their position on each of these issues.

ISSUES PRESENTED

I. Was there sufficient evidence to support a finding that Appellant engaged in conduct to prevent Ms. Hutzelman from testifying?

II. Was there sufficient evidence to support a finding that the State made a good faith effort to secure Ms. Hutzelman's attendance at trial and thus that she was unavailable?

III. Did Appellant waive any claim that the State failed to show that Ms. Hutzelman was unavailable by failing to specifically object on that basis at trial?

IV. Were Ms. Hutzelman's out of court statements admissible as non-testimonial excited utterances?

STATEMENT OF THE FACTS

On August 9, 2018 Appellant was indicted for one count of assault by impeding breath or blood committed against a family member (Count 1) and one count of assault causing bodily injury to a family member (Count 2). [CR-I-4-5]. Both offenses were alleged to have been committed against Ms. Lori Hutzelman. [CR-I-4-5]. Both offenses were enhanced in the indictment due to an allegation that Appellant had been previously convicted on October 24, 2015 in Cause Number 2014-1820 of Gregg County, Texas for a domestic violence offense. [CR-I-4-5].

On April 8, 2019 the State requested a subpoena for Ms. Lorie Hutzelman, instructing her to come to court to testify in this case on April

15, 2019. [CR-I-17]. That subpoena was served on Ms. Hutzelman on April 12, 2019. [CR-I-18-19].

On April 15, 2019 Appellant's case was called to trial. [RR-II-1]. Prior to the start of testimony a hearing was held outside the presence of the jury on the issue of whether out of court statements of Ms. Hutzelman would be admitted into evidence. [RR-III-7-8]. This was due to Ms. Hutzelman disregarding her subpoena. [RR-III-9; CR-I-18-19] Appellant indicated he would object to her statements being admitted on the grounds of hearsay and confrontation. [RR-III-8]. The State then indicated it believed Ms. Hutzelman's statements would be admissible both because the statements were non-testimonial and under a theory of forfeiture by wrongdoing. [RR-III-9-11].

The trial court then convened a hearing concerning the forfeiture by wrongdoing claim [RR-III-11], and the State called Investigator Hall Reavis to testify. [RR-III-12].

Investigator Reavis indicated that on April 8, 2019 he attempted to serve a subpoena on Ms. Hutzelman at her last known address and instead found Appellant there. [RR-III-12-13]. Investigator Reavis then stated that Appellant told him Ms. Hutzelman was not there, that he had no idea where

she was at, that they had "busted up" several months ago, and implied that she might be in Ohio. [RR-III-13].

Investigator Reavis then described attempting to serve Ms. Hutzelman at that same address on April 12, 2019 and finding her at the location. [RR-III-14]. Investigator Reavis also stated Ms. Hutzelman slammed the door in his face. [RR-III-15].

Investigator Reavis then described observing Facebook photographs of Ms. Hutzelman which showed her with Appellant as recently as April 1 of that year. [RR-III-15-16; State's Exhibits 1-3]. One of the photographs of Ms. Hutzelman with Appellant likewise had the caption, "Together We Stand Strong." [RR-III-16; State's Exhibit 1]. Appellant objected to the admission of the photographs on authentication grounds. [RR-III-17]. The trial court overruled the objection. [RR-III-17].

The State then asked the trial court to take judicial notice of the fact that Appellant's prior assault family violence conviction involved the same victim. [RR-III-18]. The trial court took judicial notice of the prior conviction [RR-III-19] and held that the videos could be admitted under the doctrine of forfeiture by wrongdoing. [RR-III-39].

Appellant objected to Ms. Hutzelman's out of court statements being admitted on the grounds that the State had not proven Appellant had

committed any misconduct to keep her from testifying. [RR-III-40-41]. Appellant did not object that the State had failed to show Ms. Hutzelman was unavailable. [RR-III-40-41].

The State subsequently recalled Investigator Reavis to supplement the record, and he indicated that he had also been to Ms. Hutzelman's residence on April 9, 2019 and observed Appellant leave the residence that day. [RR-III-42].

Trial then proceeded in front of the jury [RR-III-44], and Appellant enter a plea of not guilty to both counts. [RR-III-46].

The State called Officer John Delgado of the Longview Police Department. [RR-III-61]. Officer Delgado then testified to responding to a domestic disturbance on June 25, 2018 at a location in Gregg County, Texas and meeting Appellant at the scene. [RR-III-62-63]. Officer Delgado also stated that Appellant admitted to "getting into it" with his girlfriend. [RR-III-64].

Officer Delgado then described making contact with a woman who he characterized as seeming scared. [RR-III-64]. Officer Delgado then stated that the woman told him that Appellant had assaulted her. [RR-III-65]. Appellant did not object to this testimony. [RR-III-65].

Officer Delgado then described what the woman told him about how she had been assaulted with her specifically describing being struck with a broom ten times and being strangled. [RR-III-65-66]. Appellant did not object to any of this testimony. [RR-III-66].

Officer Delgado then described seeing physical injuries on the woman including on her face and throat. [RR-III-69].

Officer Delgado then confirmed that the woman identified herself as Lorie Hutzelman. [RR-III-70]. Appellant did not object to this testimony. [RR-III-70].

On redirect Officer Delgado reiterated that Ms. Hutzelman seemed scared when the police were talking to her. [RR-III-75-76].

The State then called Officer Jonathan Wolf of the Longview Police Department. [RR-III-77]. Officer Wolf then established that on June 25, 2018 he responded to a domestic disturbance call where he made contact with Appellant and a woman named Lorie Hutzelman. [RR-III-78].

Officer Wolf then described meeting with Ms. Hutzelman and noted that she had been crying. [RR-III-84]. Officer Wolf also characterized her demeanor as seeming upset with her being emotional. [RR-III-84].

Officer Wolf then described Ms. Hutzelman telling him how she had been attacked by Appellant. [RR-III-85-86]. After Ms. Hutzelman had

described Appellant repeatedly striking her with a broom and being strangled by Appellant, Appellant then objected on confrontation clause grounds. [RR-III-86]. The trial court again overruled Appellant's objection. [RR-III-86].

The jury found Appellant guilty on both counts. [RR-IV-10]. The jury sentenced Appellant to 5 years on Count 1 and 10 years on Count 2. [RR-IV-153-154].

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in affirming the admission of Ms. Hutzelman's out of court statements under the doctrine of forfeiture by wrongdoing. The evidence presented showed Appellant had motive to discourage Ms. Hutzleman from testifying, had ready access to her, had a history of violent behavior directed at her, and attempted to obstruct the police from serving a subpoena on her. Thus there was sufficient evidence for the Court of Appeals to conclude that the trial court did not abuse its discretion in holding that State had met its burden of showing that Appellant had attempted to prevent Ms. Hutzelman from testifying.

Nor did the Court of Appeals err in affirming the trial court's finding that Ms. Hutzelman was unavailable to testify. The evidence supported that the State made a good faith effort to secure her testimony by having her

subpoenaed, and the State was not required to seek a writ of attachment since such a writ would have been futile in this case.

Appellant also waived any claim that the State failed to establish Ms. Hutzelman was unavailable to testify by not making a specific objection on those grounds at trial and thus cannot argue that ground on appeal.

In the alternative, even if Ms. Hutzelman's statements were not admissible under the doctrine of forfeiture by wrongdoing, Appellant is still not entitled to any relief because the Court of Appeals' ruling is also correct under a different legal theory applicable to the case since those statements were also properly admissible as non-testimonial excited utterances.

ARGUMENT

I. The Court of Appeals did not err in upholding the admission of Ms. Hutzelman's statements under the doctrine of forfeiture by wrongdoing

A. Law concerning the doctrine of forfeiture by wrongdoing

Under the doctrine of forfeiture by wrongdoing a defendant cannot invoke the Confrontation Clause if they wrongfully procured the unavailability of the witness. *Shepherd v. State*, 489 S.W.3d 559, 573 (Tex. App.-Texarkana 2016, pet. ref'd.) Evidence that would have been barred as inadmissible hearsay can also be admissible under this doctrine. *Schindler v. State*, No. 02-17-00241-CR, 2018 Tex. App. LEXIS 8333 at 10 (Tex. App.-

Ft. Worth 2018, pet. ref'd.)(mem. op. not designated for publication.)

To invoke this doctrine the State must first show that the witness is legally unavailable and then show the witness is unavailable because the defendant engaged in conduct designed to prevent the witness from testifying. See *Gonzalez v. State,* 195 S.W.3d 114, 120 (Tex. Crim. App. 2006). The State must prove the defendant engaged in such conduct by the preponderance of the evidence. *Shepherd,* 489 S.W.3d at 573; see also TEX. CODE CRIM. PROC. Art 38.49(c).

The trial court's decision whether to admit evidence under this doctrine is evaluated under an abuse of discretion standard. *Shepherd,* 489 S.W.3d at 572. An abuse of discretion only occurs when the trial court's ruling is so outrageous that it falls outside the zone of reasonable disagreement. *Henley v. State,* 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). Absent an abuse of discretion, an appellate court must uphold the trial court's admission of evidence even if the appellate court itself disagrees with the ruling. See *Powell v. State,* 63 S.W.3d 435, 438 (Tex. Crim. App. 2001).

B. The Court of Appeals did not err in finding there was sufficient evidence to establish that Appellant engaged in conduct to prevent Ms. Hutzelman from testifying.

With that legal framework in mind it is clear that the Court of

Appeals did not err in finding that the trial court did not abuse its discretion in concluding that the State had established by a preponderance of evidence that Appellant engaged in conduct designed to prevent Ms. Hutzelman from testifying as there was ample evidence to support that holding.

Appellant obviously had strong motive to want to prevent Ms. Hutzelman's from testifying. She was the only direct witness to him assaulting her and thus her testimony (either directly or being offered through other witnesses) would be the lynchpin of the State's case against him.

The evidence presented at the preliminary hearing likewise showed that Appellant had ready opportunity to improperly influence Ms. Hutzelman. In the week prior to the trial Appellant was on at least two occasions observed at the same residence [RR-III-12-13, 42] where Ms. Hutzelman was subsequently located. [RR-III-14]. Appellant and Ms. Hutzelman both being spotted around the same residence at around the same time period makes it all but certain that Appellant had access to Ms. Hutzelman right before his trial was set to begin giving him every opportunity to keep her from testifying.

There was also photographic evidence that Appellant had been with Ms. Hutzelman within two weeks of the trial date as pictures were posted to

Ms. Hutzelman's social website showing her with Appellant. [RR-III-15-17; State's Exhibits 1-3]. Appellant now argues that there is no proof those photographs were actually taken close in time to the trial, but the evidence at the evidentiary hearing was that these pictures were posted on April 1, 2019. Investigator Reavis testified that the photographs were posted as recently as April 1 [RR-III-16] (which by context clearly meant April 1 of 2019 as that was the only April 1 date that was "recent" to the suppression hearing which was being held on April 16, 2019.) [RR-III-1] Investigator Reavis' testimony was also corroborated by the screenshots themselves as State's Exhibits 2 and 3 both had time markings on them showing they were posted during the morning of April 1. [State's Exhibits 2 and 3].

The trial court as the finder of fact at an evidentiary hearing is allowed to make conclusions based on reasonable inferences from the evidence presented. *Amador v. State,* 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). Furthermore, a fact finder is permitted to use their common sense and applying common knowledge, observation, and experience gained in the ordinary affairs of life when making reasonable inferences. See *Boston v. State*, 373 S.W.3d 832, 837 (Tex. App.-Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013). While it is, as Appellant argues technically possible for a person to take a photograph and then wait months

or even years before posting it, common knowledge, observation, and experience gained in the ordinary affairs of life is that (with the occasional exception of postings on "Throwback Thursday") most people typically post pictures on social media sites close in time to when the pictures were originally taken. Nothing on State's Exhibit 2 or 3 indicates they were posted pursuant to "Throwback Thursday" (indeed a review of the calendar shows that April 1, 2019 was a Monday), nor was there any other caption on these posts that suggests they were pictures from some long off event. [State's Exhibit 2-3]. Therefore in the absence of any indicators that these pictures were some sort of nostalgia post, it would certainly be a reasonable inference for the trial court to conclude that since the pictures were posted on April 1, 2019 they must have been taken at or near that date and that in turn would mean that Appellant had ready access to Ms. Hutzelman in the period of time shortly before his trial was scheduled to begin which would obviously give Appellant the opportunity to directly pressure her not to testify against him.

Appellant was also shown to have a prior history of assaulting Ms. Hutzelman. [RR-III-18-19]. This evidence was particularly significant because it established both that Appellant had the means to threaten Ms. Hutzelman (since he had a proven willingness to use violence against her)

and that any such intimidation would likely be successful (since Ms. Hutzelman would know full well that Appellant was willing to attack her.) Evidence of prior acts of domestic violence has been recognized as evidence that supports a finding of forfeiture by wrongdoing. See *Espinoza v State*, No. 05-17-00547-CR, 2018 Tex. App. LEXIS 10751 at 39 (Tex. App.-Dallas 2018, no pet.)(mem. op. not designated for publication); *Tarley v. State*, 420 S.W.3d 204, 206 (Tex. App.-Houston [1st Dist.] 2013, pet. ref'd.); *Garcia v. State*, No. 03-11-00403-CR, 2012 Tex. App. LEXIS 7543 at 11 (Tex. App.-Austin 2012, pet. ref'd.)(mem. op. not designated for publication.) Nor does it constitute improper "guessing" for the trial court to infer that a victim who has been previously assaulted by a defendant might henceforth be afraid of that defendant. Fact finders are permitted to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when making reasonable inferences. *Boston*, 373 S.W.3d at 837. And it is plain common sense to expect that a victim will be afraid of a defendant who has already previously assaulted them.

Furthermore and perhaps most compelling there was also evidence of specific misconduct Appellant committed to prevent the State from being able to serve Ms. Hutzelman. When Investigator Reavis met Appellant on

April 8, 2019 at Ms. Hutzelman's residence, Appellant claimed she was not there, that he was no longer in any kind of relationship with her, and that he had no idea where she was. [RR-III-13]. Appellant also implied that she might have left the state. [RR-III-13]. Given the already described photographic evidence which showed that Appellant had been in contact with Ms. Hutzelman within the last two weeks [State's Exhibits 2-3], and the evidence that Ms. Hutzelman was spotted at the same location no less than four days later [RR-III-14] the trial court could certainly reasonably conclude that Appellant's statements to Investigator Reavis were false, and that Appellant lied to the police as part of a deliberate attempt to keep the police from locating her. False statements from a defendant to cover up a crime are probative as consciousness of guilt evidence. *King v. State,* 29 S.W.3d 556, 565 (Tex. Crim. App. 2000). Therefore evidence that Appellant deliberately lied to Investigator Reavis regarding both the status of his relationship with Ms. Hutzelman and her whereabouts, lies that were clearly designed to keep Investigator Reavis from being able to subpoena her, constitute direct proof of Appellant attempting to prevent the State from successfully serving Ms. Hutzelman and thus are very strong evidence that Appellant was actively working to prevent Ms. Hutzelman from testifying. Furthermore evidence of a defendant taking concrete actions to obstruct the

service of a subpoena in conjunction with that defendant having a history of domestic violence involving the person the State wanted to testify has already been deemed sufficient by the Fort Worth Court of Appeals to support a trial court's finding of forfeiture by wrongdoing. See *Schindler*, No. 02-17-00241-CR at 15.

Appellant's argument on this issue ultimately centers on the contention that the State should not be able to invoke the doctrine of forfeiture by wrongdoing absent evidence of the defendant taking direct action against a witness to prevent them from testifying, but that is not and should not become Texas law. Trial courts are permitted to make logical inferences from the evidence to determine whether a defendant acted so as to prevent a witness from testifying. *Gonzalez*, 195 S.W.3d at 125. Moreover, and contrary to Appellant's claim that every court to address the doctrine of forfeiture by wrongdoing has required evidence of "some affirmative action by the defendant to keep the witness from testifying", the Dallas Court of Appeals found in the *Espinoza* case that the trial court did not abuse its discretion in admitting out of court statements under the doctrine of forfeiture by wrongdoing even absent any direct proof that the defendant had threatened the witness or told her not to come to court when the defendant having committed misconduct could be reasonably inferred based on

defendant discussing the case with the witness and having a history of domestic violence. See *Espinoza*, No. 05-17-00547-CR at 38-39.

This case is very similar to *Espinoza.* In *Espinoza* there was no direct evidence that the defendant every threatened the missing witness or told her not to testify or accept service of process, but there was evidence of the defendant committing other activities such as telling the witness not to get a job until the trial was over, frequently telling her to change her phone number, and encouraging her to move around and not stay in one place that could plausibly be interpreted as the defendant taking action to try and prevent the police from being able to serve the witness. *Id.* at 24, 30. In this case there was no direct evidence that Appellant ever threatened Ms. Hutzelman or told her not to testify or accept service of process, but there was evidence of Appellant committing other activities (specifically lying to the police about Ms. Hutzelman's whereabouts) [RR-III-12-16] that could plausibly be interpreted as Appellant taking action to try and prevent the police from being able to serve Ms. Hutzleman. And in *Espinoza* the defendant has a history of domestic violence against the witness. *Espinoza*, No. 05-17-00547-CR at 31-32. That is identical to this case where Appellant likewise has a history of domestic violence against the silenced witness. [RR-III-18]. The only significant difference between the two cases

is that in *Espinoza* the defendant was apparently locked up prior to trial. *Espinoza*, No. 05-17-00547-CR at 23-24. Thus the defendant in *Espinoza* actually had less ability to pressure a witness than Appellant had since Appellant was not incarcerated pre-trial and had easy access to the victim right before the trial. [RR-III-12-14, 42].

The fundamental logic of the *Espinoza*, that proof of a defendant improperly pressuring a witness can be inferred by the trial court even in the absence of direct proof of misconduct, is both logical and necessary. Witness intimidation by its very nature is unlikely to be done in public view. Thus to require direct evidence "of some affirmative action by the defendant to keep the witness from testifying" would be absurd. In many (perhaps even in most) cases the only person who could provide such direct evidence would be the very witness who was silenced. Thus to require direct evidence of affirmative action by the defendant to keep the witness from testifying would create an intolerable burden on the justice system and essentially give a green light to defendants to try and silence witnesses. The only way to avoid this evil is, as was done in *Espinoza*, to allow trial courts to be able to find the requisite misconduct even absent direct proof of affirmative action by a suspect when the surrounding circumstances are sufficient to support a reasonable inference that the defendant is attempting

to silence the witness.

In this case with Ms. Hutzelman having disregarded her subpoena, with Appellant having obvious motive and ready opportunity to pressure Ms. Hutzelman into not testifying, with Appellant having a specific history of committing prior violent acts specifically against Ms. Hutzelman, and with there being evidence that Appellant directly engaged in conduct to prevent the police from being able to locate and subpoena her, there was clearly sufficient basis for the trial court to make the logical inference that Appellant committed conduct designed to prevent Ms. Hutzelman from testifying. That is stronger evidence than what was deemed sufficient to enable the State to invoke the doctrine of forfeiture in *Espinoza,* and it is certainly sufficient evidence by which a reasonable factfinder could conclude that Appellant was engaged in conduct to prevent Ms. Hutzelman from testifying. Thus the trial court did not abuse its discretion in finding the State had met its burden on this point.

Perhaps a different fact finder would have decided the question differently, but that is not the question the Court of Appeals was asked to rule on, and is not the question before this Honorable Court. A reviewing court does not have to agree with the trial court's conclusion; it just has to determine if the trial court's ruling was within the zone of reasonable

disagreement. *Henley,* 493 S.W.3d at 82-83. The trial court's ruling was certainly plausible on the evidence presented and thus fell fully within that zone. Therefore the trial court did not abuse its discretion, and as such the Court of Appeals did not err in affirming the trial court's ruling.

C. Appellant is not entitled to any relief on a claim that the State failed to establish Ms. Hutzelman was unavailable to testify

1. The State made the required good faith effort to call Ms. Hutzelman and was not required to seek a writ of attachment because such a writ would have been futile.

To establish that a witness is unavailable for purposes of invoking the doctrine of forfeiture the State must show that a good faith effort was made before trial to locate and present the witness. *Reed v. State,* 312 S.W.3d 682, 685 (Tex. App.-Houston [1st Dist.] 2009, pet. ref'd.) The State is not and should not be required to engage in clearly futile efforts to show it made a good faith effort to secure the attendance of a witness. *Ledbetter v. State,* 49 S.W.3d 588, 594 (Tex. App.-Amarillo 2001, pet. ref'd.)

In this case it was clear the State made a good faith effort to secure the attendance of Ms. Hutzelman at trial. The State prepared a subpoena for Ms. Hutzelman [CR-I-17] and attempted to serve the subpoena at Ms. Hutzelman's last known address on both April 8 and 9 [RR-III-12-13, 42] before finally successfully serving the subpoena on Ms. Hutzelman on April 12. [RR-III-14]. Notably, the State continued trying to serve Ms.

Hutzelman even after Appellant himself insinuated that she had left the state. [RR-III-13]. Ms. Hutzelman subsequently disregarded the subpoena and, did not appear for court on April 15, 2019 as required. [RR-III-9; CR-I-18-19].

Appellant now contends that despite the State's repeated efforts to subpoena Ms. Hutzelman that was insufficient to constitute a good faith effort to procure her testimony, since the State did not seek a writ of attachment against her upon her refusing to honor the subpoena. There is no legal requirement that the State seek a writ of attachment to establish a good faith effort to serve a witness. Instead whether the State sought a writ of attachment is simply one of the factors a trial court can consider in deciding whether the State made a good faith effort to secure the attendance of the witness. *Ledbetter,* 49 S.W.3d at 594.

In this case it is clear that attempting to obtain a writ of attachment against Ms. Hutzelman would have been futile as the State's previous efforts to subpoena Ms. Hutzelman had already established how unlikely such a writ was to succeed. Two of the three previous times the State sought out Ms. Hutzelman at her last known address, the State's investigator was not even able to locate her [RR-III-12-13, 42], and the one time the State's investigator was able to find her at that location, Ms. Hutzelman slammed

the door in the officer's face as soon as he stated he was there with a subpoena [RR-III-14-15] and refused thereafter to open the door or otherwise respond to the investigator. [RR-III-15, 18]. If Ms. Hutzelman would not open the door for an officer serving a subpoena then logically she would also not open the door for an officer attempting to serve a writ of attachment. Moreover, it took four days from when the subpoena was issued for law enforcement to actually locate and serve Ms. Hutzelman. [RR-III-12-14]. While getting her served in four days was actually fairly impressive given the active obstruction of both Appellant [RR-III-13] and Ms. Hutzelman [RR-III-15], it is not a timeframe that would provide optimism that a writ of attachment could be served in time to be effective given that Appellant's trial was certainly not going to take four days. (Indeed even with the State being able to introduce Ms. Hutzelman's out of court statements, the case was already to the jury by the second day.) Thus given the established history of how long it takes to serve Ms. Hutzelman and the fact that serving her with a writ of attachment, which would require actually taking physical custody of her, would be much more difficult than serving her with a subpoena (which can just be left for her), it was extremely unlikely that any writ of attachment could be effectively served in time to be of use in the trial.

Nor would a writ of attachment authorize officers to force their way into Ms. Hutzelman's residence to try and locate her. The State is unaware of any legal authority that authorizes officers to enter a residence under a writ of attachment. Furthermore, even if we assume in arguendo that a writ of attachment grants police officers the same authority to forcibly enter a private residence that an arrest warrant provides that would still not give the officers carte blanch to force their way into Ms. Hutzelman's residence. Before an officer can legally enter a residence to serve an arrest warrant they must have a reasonable belief that the person being sought is in the residence. See *Payton v. New York,* 445 U.S. 573, 602-603 (1980)(holding that an arrest warrant authorizes entry into a residence in which a suspect lives only if there is a reasonable belief they are present.) Presumably the same requirement would apply to writs of attachment, and an officer would thus have to have a reasonable belief a person was in a residence before they could enter the residence under a writ of attachment.

In this case at the time that any writ of attachment was issued it had already been three days since Ms. Hutzelman was last seen at the residence. [RR-III-9; 14]. Nor was it likely the police would be able to timely obtain any new information showing Ms. Hutzelman was still at the residence, since common sense dictates that it is extremely unlikely that a person

disobeying a subpoena will answer the door at their residence to the police (or to any people she does not know) as long as the trial they are trying to avoid is in progress.

Probable cause to believe that an item (or in this case a person) is located at a certain place evaporates over time. *Swearingen v. State*, 143 S.W.3d 808, 813 (Tex. Crim. App. 2004). Furthermore, how quickly probable cause evaporates is governed by reason and common sense. *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011). Reason and common sense make clear that probable cause that a witness, who is trying to avoid testifying in a trial, is at a certain location will evaporate rather quickly because a witness who doesn't want to be located by the police and who knows that they only have to stay hidden for a couple of days is unlikely to stay at the location where they know the police have previously located them.

Therefore the mere fact that officers had seen Ms. Hutzelman at that location three days previously did not give them sufficient basis to have a reasonable belief she was still there. At most officers would have had a hunch that she might be there, and a mere hunch is not enough to justify the police forcing their way into a private home. As a consequence even if writs of attachment can potentially authorize entry into a private residence, the

officers in this case still would not have had sufficient legal authority to justify entering Ms. Hutzelman's residence and were unlikely to be able to obtain enough information to establish a legal basis to enter the residence before the writ of attachment was rendered moot by the conclusion of Appellant's trial (the guilt-innocent segment of which only lasted a single day.) [RR-IV].

Nor is it realistic to think that if a writ of attachment was issued, officers might be able to serve it in sufficient time by randomly stumbling across Ms. Hutzelman out on the street somewhere. Even if Ms. Hutzelman was out and about, only having a single day to find her before the trial was over would make it virtually impossible the police would encounter her in time. And of course it was very unlikely that Ms. Hutzelman was out and about, as the smart move for an uncooperative witness who wants to avoid testifying would be to hole up at a friend or family members or even at a random motel and just stay there until the trial was over.

Thus given that Ms. Hutzelman certainly would not have opened the door for the police, that the police likely lacked legal authority to enter the residence where she had last been seen, that it was dubious she was even still at the residence during the timeframe of the case, that the police lacked any other information as to where Ms. Hutzelman might be, and that it was

virtually impossible that they would just happen to randomly locate her in the short period of time from when she refused to appear at court to when the trial would have been over, it is clear that a writ of attachment would have been a futile gesture in this case, and the State is not and should not be required to engage in futile gestures simply to show that it has made a good faith effort to locate a witness. *Ledbetter*, 49 S.W.3d at 594.

The length to which the prosecution must go to produce a witness is ultimately a question of reasonableness. *Ohio v. Roberts*, 448 U.S.56, 74 (1980). Nor does the Sixth Amendment require the prosecution to exhaust every avenue of inquiry no matter how unpromising. *Hardy v. Cross*, 565 U.S. 65, 71-72 (2011). Indeed in some cases the prosecution is not even required to have issued a subpoena for a difficult witness before finding them to be unavailable. *Id.* at 71. In this case the State made extensive efforts to subpoena Ms. Hutzelman and after several attempts over a four day period [RR-III-12-14], attempts that were made in the face of active obstruction from Appellant [RR-III-13], did succeed in serving her. That Ms. Hutzelman then refused to obey that subpoena does not invalidate the State's efforts. Nor is there any reason to believe that a writ of attachment would have been anything other than futile given the established history of non-compliance from Ms. Hutzelman and the extreme improbability that she

could be successfully attached before the trial was over. As such the State's efforts at subpoenaing Ms. Hutzelman were sufficient by themselves to establish a good faith effort to secure her testimony even without the State seeking a writ of attachment, and as a consequence her subsequent refusal/inability to comply with that subpoena made her legally unavailable for purposes of the State being able to invoke the doctrine of forfeiture by wrongdoing. Therefore the Court of Appeals did not err in holding that the State had established Ms. Hutzelman was unavailable for Confrontation Clause purposes.

Accordingly, the State satisfied both the prerequisites for being able to employ the doctrine of forfeiture by wrongdoing to introduce the out of court statements of Ms. Hutzelman and as such the Court of Appeals did not err in upholding the admission of that evidence.

2. Appellant's waived any claim that the State failed to prove Ms. Hutzelman was unavailable by not making that argument at trial.

In the alternative, Appellant also waived any claim of error related to the trial court deeming Ms. Hutzelman unavailable by failing to make any objection on that basis at trial and thus is now barred from raising this issue in the appellate courts.

As a general rule appellate courts will not consider a claim of error

that was not first raised in the trial court. *Johnson v. State*, 878 S.W.2d 164, 167 (Tex. Crim. App. 1994). A trial objection also must be specific in order to preserve a complaint for review on appeal. See TEX. R. APP. P. 33.1(a)(1)(A); *Buchanan v. State*, 207 S.W. 3d 772, 775 (Tex. Crim. App. 2006). A general or imprecise objection may be sufficient to preserve error but only if the legal basis for the error is obvious to the court and the opposing counsel; when the legal basis of the objection is not obvious, failure to make a specific objection at trial forfeits that issue for appeal. *Id*. Likewise an objection stating one legal theory cannot be used to support a different legal theory on appeal. See *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995).

In this case while Appellant did object to the State introducing evidence under the forfeiture by wrongdoing doctrine, Appellant never objected on the specific grounds that the State had failed to prove Ms. Hutzelman was unavailable as a witness. [RR-III-40-41]. Instead Appellant's argument was entirely focused around a claim that the State had failed to show that Appellant had committed any misconduct to keep Ms. Hutzelman from testifying. [RR-III-40-41]. Thus Appellant is now raising a different argument on appeal than what he pursued at trial. Appellant never objected at trial on the grounds the State had failed to establish the witness

was unavailable and corresponding never gave the trial court the opportunity to address that claim. As such Appellant is now foreclosed from raising that issue on appeal.

II. In the alternative even if the doctrine of forfeiture did not apply, Appellant is still not entitled to any relief because the objected to statements were also admissible as non-testimonial excited utterances.

In the alternative even if Ms. Hutzelman's out of court statements were not admissible under the doctrine of forfeiture by wrongdoing, Appellant is still not be entitled to any relief because Ms. Hutzelman's out of court statements were also properly admissible as non-testimonial excited utterances.

Texas law holds that so long as a trial court's ruling is correct under any theory of law applicable to the case then that ruling will be upheld, even if the trial court's stated reason for the ruling is not the correct ruling. See *Calloway v. State,* 743 S.W.2d 645, 651-652 (Tex. Crim. App. 1988). This is significant because in this case the doctrine of forfeiture by wrongdoing was not the State's only argument for why Ms. Hutzelman's out of court statements were admissible. Instead the State also argued that the statements were non-testimonial [RR-III-9-10] and presented evidence at trial showing that the statements were excited utterances. [RR-III-64, 84].

Only "testimonial" statements implicate the Confrontation Clause.

See *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Thus to determine whether an out of court statement made by a person who is unavailable to testify is barred by the Confrontation Clause or not it is first necessary to determine if the out of court statement was testimonial or non-testimonial. *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004).

In this case the out of court statements of Ms. Hutzelman at issue were all clearly non-testimonial in nature. The statements were made by Ms. Hutzelman to law enforcement as part of the investigating officers' initial inquiries upon arriving at the scene of a reported domestic violence incident with the officers trying to secure the scene. [RR-III-62-65, 78; State's Exhibit 12]. This is critical because initial inquiries by law enforcement officers arriving at a crime scene involving domestic disputes generally produce non-testimonial statements because the officers take those statements, not to secure testimony for a future court hearing but rather because the responding officers "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." See *Garcia v. State*, 212 S.W.3d 877, 883 (Tex. App.-Austin 2006, no pet.); see also *Spencer v. State*, 162 S.W.3d 877, 882 (Tex. App.-Houston [14th Dist.] 2005, pet. ref'd.)(holding that responses to preliminary questions by police at the scene of a crime while police are

securing and assessing the scene are not testimonial). Accordingly, Ms. Hutzelman's initial statements to the police about what had happened to her were non-testimonial statements and as a consequence did not implicate the Confrontation Clause. See *Crawford*, 541 U.S. at 68.

Ms. Hutzelman's out of court statements were also admissible against any hearsay based exception. The State presented evidence at trial that Ms. Hutzelman was "scared" when Officer Delgado first contacted her [RR-III-64] and that she had been crying and was in an emotional state when Officer Wolf spoke with her. [RR-III-84]. With Ms. Hutzelman in an emotional state from having been assaulted, the trial court had ample cause to conclude that her statements to the officers qualified as an excited utterance under Texas Rule of Evidence 803(2) and thus were not barred by the prohibition against hearsay.

Nor would it matter if some of Ms. Hutzelman's statements did not qualify as non-testimonial excited utterances. Appellant made a global confrontation and hearsay objection to all of Ms. Hutzelman's statements. [RR-III-7-8]. This is significant because a trial court is not required to cull through challenged evidence to segregate the admissible from inadmissible. *Barnes v. State*, 876 S.W.2d 316, 329 (Tex. Crim. App. 1994). Instead if evidence is offered that contains both admissible and inadmissible segments,

the trial court can admit or reject that evidence in total, and the losing party has no recourse on appeal for failing to specifically identify the segments that were admissible/not admissible. *Barnes*, 876 S.W.2d at 329.

Therefore even if some of Ms. Hutzelman's out of court statements did not technically qualify as non-testimonial excited utterances, Appellant is still not entitled to any recourse from the admission of her out of court statements in total, so long as at least one of the objected to statements was a non-testimonial excited utterance.

Accordingly, Ms. Hutzelman's out of court statements were properly. admissible against confrontation and hearsay objections not just under the doctrine of forfeiture by wrongdoing but also as non-testimonial excited utterances, and as such the Court of Appeals did not err in affirming the admission of those statements.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that the number of words in Appellee's Brief submitted on May 4, 2020, excluding those matters listed in Rule 9.4(i)(1) is 6,661.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that a copy of the foregoing brief has been served on Vincent Christopher Botto, Attorney for Appellant, Frederick L. Brown, by electronic mail at vchrisbottolaw@gmail.com and on Stacey Soule, State Prosecuting Attorney, by depositing same in the United States Mail, postage prepaid on this the 4th day of May, 2020.

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